WONG LENG HUNG

v.

KRISHNAMURTHY NAGARATNAM

HIGH COURT MALAYA, KUALA LUMPUR
AZMEL MAAMOR J
[SUMMONS NO: S2-22-339-1995]
4 SEPTEMBER 2004

CONTRACT: *Termination - Wrongful termination - Whether delay in applying for FIC approval gave rise to right to terminate contract where no time period stated for making such application - Whether delay caused prejudice*

CONTRACT: *Deposit - Recovery of - Termination of agreement by defendant had no legal effect until defendant fully refunded all monies paid by plaintiff*

EVIDENCE: *Cross-examination - Failure to crose-examine - Failure to cross-examine plaintiff's witnesses on explanation as to cause of delay in applying for FIC approval - Whether explanation deemed accepted*

The plaintiff (a foreigner) had agreed to purchase the defendant's land and building (the said property) at the price of RM506,000 and a sale and purchase agreement was executed between them (the said agreement), whereby the plaintiff paid part of the purchase to the defendant amounting to RM72,000 and also the sum of RM400,000 towards payment for the redemption of the said property. The purchaser had agreed to pay the redemption sum of RM400,000 immediately upon execution of the agreement to avoid the said property from being auctioned. The said agreement did not provide for a completion date. It provided that the plaintiff had to obtain the approval of the Foreign Investment Committe (FIC) for the purchase. The said agreement gave the plaintiff an option to transfer the said property to his nominee in the event the FIC's approval could not be obtained. It was also provided in the said agreement that the vendor could forfeit the deposit money in a case of termination of the said agreement due to the fault of the purchaser but in such event the vendor would have to refund the rest of the purchase price paid by the purchaser.

About six months after the execution of the said agreement, the defendant purported to terminate the said agreement on the grounds that the plaintiff had failed to apply expeditiously to the FIC for their approval. At the time of the purported termination of the said agreement the plaintiff had paid more than

90% of the purchase price. As such, the plaintiff brought this action against the defendant claiming specific performance of the said agreement. The main issue that had to be determined was whether the termination of the said agreement by the defendant was lawful and in order.

Held (allowing the plaintiff's claim for specific performance with costs):

[1] The termination of the said agreement by the defendant was unlawful and unenforceable. (p. 749 d)

[2] Under cl. 3.1.1 the duty of the plaintiff to apply for the FIC approval was to be "as expeditiously as possible". The clause did not state the time period for which such application must be made. The plaintiff's witnesses explanation as to the cause of the delay in applying for the FIC approval was not cross-examined by the defendant and therefore deemed as having been accepted. On the facts of this case, the delay had not caused any prejudice to the defendant. (pp. 749 e-f & 750 b)

[3] In order for the plaintiff to effectively terminate the said agreement it would be incumbent upon him to refund all the monies paid by the plaintiff. Not even a sen had been refunded by the defendant to the plaintiff. Since the defendant when issuing the termination letter, did not refund to the plaintiff the monies the plaintiff had paid in respect of the purchase price, the termination of the said agreement by the defendant had no legal effect until such time the defendant had fully refunded the amount of monies paid by the plaintiff. (p. 750 d-f)

For the plaintiff - Ashok Kandiah (David Mathews); M/s Mathews Hun Kandiah
For the defendant - Nor Asmah Che Din; M/s Murthi & Partners

Reported by Amutha Suppayah

JUDGMENT

Azmel Maamor J:

The original plaintiff in this case has passed away. His sister, Wee Kim Lien (PW2) was granted an order of substitution dated 8 December 2000 to proceed with this action (encl. 81).

The plaintiff's main claim in this action is for the specific performance of a sale and purchase transaction in respect of the defendant's property held under Q.T.(R)11861 Lot No. 5286 Mukim of Ampang, Kuala Lumpur together with a building erected on it known as No. 37, Taman Grand View, Ampang Jaya, Selangor (the said property).

The brief facts of the case are as follows. The defendant had charged the said property to Kuala Lumpur Finance Bhd. (KLF). On 27 July 1984 an order for sale by way of public auction of the said property was granted to KLF to recover the sum of RM432,977.66 owed by the defendant.

On 26 August 1991 by a vesting order KLF vested all its rights to United Malaysian Banking Corporation Bhd. (UMBC). On 3 August 1994 by a consent order the defendant was allowed to redeem the said property for a reduced sum of RM400,000 payable within a period of three months failing which the order for sale dated 27 July 1984 would be enforced.

In his efforts to obtain the redemption money the defendant met the original plaintiff. At their meeting the plaintiff agreed to purchase the said property at the price of RM506,000. Consequently on 15 October 1994 a sale and purchase agreement in respect of the said property was executed between them (the said agreement), whereby the plaintiff paid part of the purchase to the defendant amounting to RM72,000 and also the sum of RM400,000 towards payment for the redemption of the said property. In all the plaintiff had paid a total sum of RM472,000 of the purchase price.

On 5 May 1995, some 6 months after the execution of the said agreement the defendant wrote to the Foreign Investment Committee (FIC), enquiring whether the plaintiff, a citizen of Singapore, had made any application for the FIC approval, pursuant to cl. 3.1.1 of the said agreement. FIC replied that no such application was made by the plaintiff. Based on such information the defendant instructed his solicitors to terminate the said agreement. On 6 June 1995 the defendant's solicitors issued a letter of termination to the plaintiff. It was against this termination of the said agreement that the plaintiff brought this action against the defendant.

At the hearing the plaintiff called two witnesses, the first was the solicitor who drafted the said agreement, Leonard Foo Tet Seong (PW1) and secondly, the original plaintiff's sister, Wee Kim Lien (PW2). The defence only called one witness, the defendant himself.

In this case the only main issue that had to be determined is whether the termination of the said agreement by the defendant was lawful and in order.

In order to determine this issue it is essential to consider the relevant provisions of the said agreement and the circumstances under which it was entered between them.

At the outset it is an undisputed fact that the plaintiff/purchaser is a foreigner and as such in order to transfer the said property to him the approval of the FIC is essential. It is for that reason that cl. 3.1.1 application for FIC approval was included in the said agreement. Clause 3.1.1 reads:

> 3.1 The Purchaser shall at his own cost and expense:
>
> 3.1.1 apply as expeditiously as possible to the FIC for their approval for the Purchaser to purchase the said Property subject to the existing Tenancy and not as an owner - occupied property only (hereinafter referred to as "the FIC Approval.")

However it was provided at the last paragraph to cl. 3 the plaintiff is given an option to transfer the said property to his nominee in the event the approval of the FIC could not be obtained for whatever reason. That last paragraph to cl. 3 reads:

> The vendor and the purchaser hereby expressly agree that in the event that the purchaser is unable to obtain the FIC approval or the land authorities' consent for any reason whatsoever or if the FIC approval or the land authorities' consent is granted to the purchaser to purchase the said property but subject to the conditions not acceptable to the purchaser, the purchaser is at liberty to have the property transferred to a nominee(s) or to sell the said property to any third party be it a person body corporate or politic whatsoever at such price and upon such terms and conditions as the purchaser shall deem fit.

Clause 4 of the said agreement on forfeiture is of relevance. This clause, while allowing the vendor to forfeit the deposit money in a case of termination of the said agreement are to the fault of the purchaser, also requires the vendor to refund the rest of the purchase price that had been paid by the purchaser. Only after such refund having been done is the said agreement considered terminated. It reads as follows:

> 4. Forfeiture
>
> 4.1 In the event that the purchaser shall fail to pay the balance purchase price or any part thereof upon the execution of this agreement the vendor shall be at liberty to forfeit absolutely the deposit of Ringgit Malaysia Thirty-Six Thousand (RM36,000) only as agreed liquidated damages and shall refund to the Purchaser all other monies paid hereunder (if any) whereupon this agreement shall be terminated and rendered null and void and thereafter neither party shall have any claim whatsoever against the other.

In order to avoid the said property from being auctioned the purchaser had agreed to pay the redemption sum of RM400,000 immediately upon execution of the said agreement. Hence at the time of the purported termination of the

said agreement the plaintiff had paid more than 90% of the purchase price. It must also be noted that the said agreement does not provide for a completion date.

With the above scenario I shall now state the relevant content of the defendant's termination letter:

> Our client has informed us that your client is in breach of cl. 3.1.1 of the sale and purchase agreement dated 15 October 1994 by failing to apply expeditiously to the FIC for their approval. A copy of the letter dated 27 May 1995 from the Economic Planning Unit is enclosed for your perusal. Pursuant to the abovesaid breach our client has instructed us to terminate the aforesaid sale and purchase agreement forthwith and in compliance with cl. 6.2 your client is to remove the private caveat within fourteen (14) days from the date hereof failing which our client shall proceed with legal proceedings to remove the private caveat and claim for damages.

After having considered the evidence of the witnesses at the hearing as well as the documents tendered in court including the submissions given by both counsels I arrived at the conclusion that the termination of the said agreement by the defendant was unlawful and unenforceable. My reasons are as follows.

Firstly, under cl. 3.1.1 the duty of the plaintiff to apply for the FIC approval was to be "as expeditiously as possible". The clause does not state the time period for which such application must be made. The plaintiff's witnesses have explained why there was a bit of delay in making the application. This was due to the fact that the plaintiff was at the same time intending to purchase another property in Melaka. Such transaction would also require the FIC approval. Therefore the plaintiff, under such circumstances, had to make a decision which of the two properties would be more appropriate to seek the approval of FIC. It is therefore quite natural that the plaintiff requires a bit of time to decide on the best form of strategy to be adopted under the circumstances. The plaintiff's witnesses had given the explaination as to the cause of the delay in applying for the FIC approval. The plaintiff's explaination at the hearing was not cross-examined by the defendant and therefore deemed as having been accepted.

It is my considered view that the issuance of the letter of termination by the defendant was premature. Before issuing the letter the defendant should have asked the plaintiff as to whether he was proceeding to apply for the FIC approval or to make use of his nominee for which the FIC approval would not be necessary. Without first determining such option from the plaintiff the defendant had, in my opinion, acted prematurely. The term "apply as expeditiously as possible" as stated in the said agreement is not the same as "apply expeditiously" as used by the defendant in his termination letter of

6 June 1995. "As expeditiously as possible" is a time frame which depends on the circumstances of each particular case. It does not have a specific time period. The term "reasonable time" would be the nearest meaning to be given to it. In this particular case given the circumstances the plaintiff was in, with the option to have the said property to be transferred in his own name or in the name of his nominee, coupled with the plaintiff's intention to purchase the Melaka property, it would only be fair and proper that reasonable time be given to the plaintiff to determine which option he wished to take. The most important factor to be considered especially by the defendant, should be that the said property had been fully redeemed. As such any delay would not cause any prejudice to the defendant. And the balance purchase price remaining unpaid was only RM34,000 out of a total purchase price of RM506,000. In my view the unilateral act of the defendant without first enquiring from the plaintiff in issuing the letter of termination was very high handed to the extent that it became unlawful and unenforceable. In addition, he failed completely to reciprocate the willingness and the good deed of the plaintiff in ensuring that the said property had not been auctioned off, under which circumstances the defendant would not have benefited as much as he had under this transaction.

Secondly, in order for the plaintiff to effectively terminate the said agreement it would be incumbent upon him to refund all the monies paid by the plaintiff. And in this case the purchase price paid by the plaintiff was RM472,000. Not even a sen had been refunded by the defendant to the plaintiff. Based on the defendant's termination letter and the ground given, I am not very certain that the defendant was entitled to forfeit the deposit of RM36,000 because the letter of 6 June 1995 did not say that the plaintiff's breach was due to non-payment of any part of the purchase price. Since the defendant when issuing the termination letter, did not refund to the plaintiff the monies the plaintiff had paid in respect of the purchase price, the termination of the said agreement by the defendant would have no legal effect until such time the defendant had fully refunded the amount of monies paid by the plaintiff. This requirement is clearly provided under cl. 4 of the said agreement.

In the circumstances I allowed the plaintiff's claim for specific performance of the said agreement as prayed under prayer 2(c) and (d). I also allowed plaintiff's claim under prayers 3, 4, 5, 6 and 7.

In the light of my finding that the termination of the said agreement by the defendant was unlawful and improper for the reasons as I have stated above I therefore dismissed the defendant's counter-claim praying for the return of the following documents from the plaintiff:

1. The original document of title Q.7.(R) 11861 for L.O. No. 5286 Mukim Ampang, Daerah Ulu Langat;

2. The relevant Registered Charge;

3. The duly executed Discharge of Charge; and

4. The certified true copy of the Vesting Order dated 28 August 1991.

I also ordered that costs of this action be paid to the plaintiff by the defendant.